No. 87-354

In The
Supreme Court of the United States
October Term, 1987

THE STATE OF ARIZONA,
Petitioner,

vs

RONALD WILLIAM ROBERSON,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

PETITIONER'S REPLY BRIEF ON THE MERITS

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RESPONDENT'S BRIEF, IN EMPHASIZING THE SUPPOSED INVOLUNTARINESS OF ROBERSON'S STATEMENT TO DETECTIVE COTA-ROBLES, BOTH OVERLOOKS THE FACTS (WHICH DEMONSTRATE ROBERSON'S STATEMENT TO HAVE BEEN VOLUNTARY), AND EFFECTIVELY CONCEDES THE NEED TO CHANGE THE PER SE EDWARDS RULE, WHICH CURRENTLY MAKES VOLUNTARINESS IRRELEVANT.

The issue before this Court is whether the *per se* rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), is properly applicable to a case where a suspect is ultimately questioned about a crime wholly separate from the one in view when he was given his rights warnings and asked for a lawyer. Necessarily implied by that question is the threshold question whether the *per se* rule of *Edwards* should be applied in *any case*, a matter addressed by both parties. (*See* Petitioner's Brief at 35-41; Respondent's Brief at 18-20.) However, the major theme of Respondent's Brief seems to be an effort to convince this Court that Roberson's April 19, 1985 statement to Detective Cota-Robles was not voluntarily given.[1]

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1 Respondent's Brief flatly calls the statement involuntary at least six times. (See pages 10-11, 13, 15, 16, 20, 23.) It repeatedly argues, despite this Court's recent decision in *Colorado v. Connelly*, — U.S. —, 107 S.Ct. 515 (1987), that the analytical focus should be on the suspect's state of mind. (See pages 12, 20, 23.) It refers almost a dozen times to the repeated questioning of Roberson. (Pages 1, 10, 11, 13, 14, 16, 18, 19, 20.) It repeatedly emphasizes the length of time Roberson was in custody without counsel before he was questioned by Detective Cota-Robles. (Pages 1-2, 10, 11, 14, 16, 19, 24.) It even characterizes the trial court's action as being a "finding that the confession was involuntary." (Page 20.)

Respondent's zeal to demonstrate involuntariness does a disservice to this Court in at least two ways. First, it tends to create a distorted view of the facts of this case. For example, one may read Respondent's Brief in its entirety without ever finding mention of the fact that the trial court concluded that Roberson's statement *was* voluntary, and therefore was admissible as impeachment if Roberson testified at trial. (R.T. of April 3, 1986, at 43-36; *see also* Petitioner's Brief at 6.) That conclusion was not challenged in the Arizona Court of Appeals during the State's appeal of the suppression order, which was strictly limited to the *Edwards* issue. (*See* the various briefs included with the record certified to this Court.) Therefore, that Roberson's statement was indeed voluntary simply is not open to question in this Court, and Respondent's characterization of the trial court's ruling is manifestly wrong.

Another example: Respondent's Brief at 1, 10, 13, and 20 asserts that all of the questioning after Roberson's arrest, except Detective Cota-Robles' interview on April 19, 1985, related to "Crime One", the April 16 burglary during which Roberson was apprehended. This tends to create an impression of badgering, that culminated in the statement given to Cota-Robles. However, there actually is nothing in the record from which it can be positively determined what the subject matter of each interview was, but there are strong indications that several of the interviews concerned information about others' drug offenses and robberies, which Roberson was offering to mitigate the heavy sentence he expected to receive on his burglary, and were *not* repeated interrogations about "Crime One", in which he had been caught "red-handed". (*See* R.T. of

Oct. 17, 1985, at 12, 18, 27-28; R.T. of April 3, 1986, at 29-30.) Thus, Respondent's Brief has gone to great lengths to create an aura of involuntariness when the facts indicate, and the trial court found, that Roberson's statement to Detective Cota-Robles was wholly voluntary.

This baseless emphasis on supposed involuntariness is particularly inappropriate in this case, because the essence of Respondent's position is that the *Edwards* rule should be maintained in all its *per se* rigidity. Voluntariness-in-fact is completely irrelevant if the *per se* rule of *Edwards* remains viable; the point of that case was the establishment of an absolute rule against police-initiated renewal of interrogation, so that it simply doesn't matter whether Robert Edwards or Ron Roberson or any other suspect is speaking voluntarily, if they don't get in the first word. Thus, much of Respondent's Brief appears to be a purely emotional appeal, of negligible assistance to the Court in resolving the issue before it. However, the inability of Respondent's Brief to escape voluntariness analysis, even in the midst of advocacy of the *Edwards per se* rule, dramatically demonstrates an intuitive recognition of where the fundamental values of our constitutional criminal law system truly reside. Even the attorney with the greatest imaginable stake in the maintenance of the *Edwards per se* rule has implicitly acknowledged that it is resolution of the issue of voluntariness-in-fact which permits us to say whether someone was *compelled* to incriminate himself (contrary to the Fifth Amendment), or whether it is fundamentally *fair* (as required by the Due Process Clause of the Fourteenth Amendment) for the person's statement to be admitted into evidence against

him. Thus, Respondent's own advocacy supports revision of the *per se* rule of *Edwards*.

This Court has previously been presented with a variety of reasons why the *Edwards* rule is ripe for reevaluation. (*See* Petitioner's Brief at 35-41.) Respondent's Brief unwittingly but forcefully supports the proposition that the *Edwards per se* rule should be abandoned, by showing that the rule is not really responsive to the question it was supposed to answer—whether it is *just* in the constitutional sense to admit the defendant's statements against him. That only a voluntariness inquiry can accomplish. If the recognized social costs inflicted by utilization of an exclusionary rule are not substantially outweighed by the benefits to be derived from the use of such a rule, its implementation cannot be justified. Seven years experience with the *Edwards* rule shows that its benefits are unacceptably costly, so it should now be abandoned in favor of the traditional rights waiver test of *Johnson v. Zerbst*, 304 U.S. 458 (1938).

II.

TO THE EXTENT THAT THE SIXTH AMENDMENT IS A SOURCE FOR THE PER SE RULE OF EDWARDS V. ARIZONA, PROPER ANALYSIS REQUIRES THE CONCLUSION THAT THE STATEMENTS OBTAINED IN THIS CASE SHOULD HAVE BEEN ADMITTED.

When Respondent does deal with the nature and effects of *Edwards* as a *per se* rule, rather than attempting to create an emotionally-charged vision of relentless police "badgering", he finds himself on the horns of a dilemma. The decision in *Miranda v. Arizona*, 384 U.S. 436 (1966),

spoke of two situations in which interrogation of a suspect should cease: when he invokes his right to silence and when he asks for a lawyer. This Court concluded in *Michigan v. Mosley*, 423 U.S. 96 (1975), that invoking the right to silence was not an absolute bar to further police questioning, so long as the suspect's right was "scrupulously observed". It would seem logical that invocation of the "right to counsel", which in the context of interrogation acts in precisely the same way as invocation of the right to silence, should have been treated in the same way—a voluntary waiver would be acceptable at some point in time if the right was "scrupulously observed".

Instead, this Court created the *per se* rule of *Edwards*, forbidding any police-initiated renewal of questioning. This differing treatment was apparently based on a perception that the "right to counsel" was of such value, even in interrogation situations, that it needed to be more jealously protected. It is far from clear that, at least in the context of pre-arraignment interrogation, such a distinction can properly be drawn. An account of an address given in 1983 by Yale Kamisar, one of the staunchest supporters of *Miranda* and its progeny, indicates that even he cannot rationalize the distinction.

> Preliminarily, Kamisar discussed Miranda's progeny in general, focusing on the Court's differentiation between invocation of the right to remain silent in Michigan v. Mosley, 423 U.S. 3017 [sic] (1975), and invocation of the right to counsel. He termed it "baffling" that the Court has given the police greater leeway to resume interrogation when the right to remain silent has been asserted. Miranda's language cuts the other way, he suggested; furthermore, logic would seem to call for greater protection of the right to re-

> main silent since that is the basic right that Miranda meant to safeguard. The right to counsel is merely a derivative right in these circumstances.

(34 Crim.L.Rep. at 2101.) However, if *extra* protection is to be accorded to an invocation of the "right to counsel", which on its face appears to be a mere adjunct and offshoot of the Fifth Amendment right to silence, whence comes this additional value which requires special safeguards? The only possible source would seem to be another amendment, presumably the Sixth, which in other contexts generates the right to the assistance of counsel.

And therein lies the rub for Respondent. Sixth Amendment rights must also have Sixth Amendment limits, unless a logically indefensible attitude of "Heads, I win; tails, you lose" is adopted, applying to a criminal defendant the benefits but not the strictures of Sixth Amendment analysis. As pointed out in Petitioner's Brief at 31-33, this Court's decisions in *Maine v. Moulton,* 474 U.S. 159 (1985), and *Moran v. Burbine,* 475 U.S. 412 (1986), plainly indicate that the Sixth Amendment requires a knowing circumvention of an accused's rights for there to be a violation, and will not permit an error committed in one case to be the basis for suppressing evidence in an unrelated case which contained no error. Such an analysis would certainly require admission of Roberson's statement to Detective Cota-Robles, because *Miranda* was followed to the letter and the statement was voluntary, so there was no basis for exclusion in that case, taken by itself.

Respondent wants the *Edwards* rule to remain rigid, when the only basis for distinguishing the multi-factor

Mosley approach from the *per se Edwards* approach is that the *Edwards*-protected right apparently is at least partially derived from the Sixth Amendment rather than solely from the Fifth Amendment—and Sixth Amendment analysis entails admission of Roberson's statement. Respondent's Brief cannot resolve this tension; it merely mumbles for one paragraph (pages 17-18) and hurries on. This Court's intellectual integrity will not permit it to skirt the issue in this way. If the Sixth Amendment is indeed one of the sources for *Edwards,* then *Maine v. Moulton* and *Moran v. Burbine* require the statement in this case to be found admissible. If the Sixth Amendment is *not* a source for *Edwards,* and the *Miranda*-generated "right to counsel" is merely an adjunct to the Fifth Amendment right to silence, then logically the *per se Edwards* rule must be abrogated and a consistent *Mosley*-like approach be adopted whenever a *Miranda* right waiver is at issue.

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CONCLUSION

Respondent's Brief discloses no substantial defects in the reasoning of Petitioner's Brief. Therefore, this Court should award one of the alternate forms of relief requested by Petitioner—either restrict *Edwards* to one-investigation cases or (preferably) abrogate altogether the *per se* rule of *Edwards*, substituting an approach like that utilized in *Michigan v. Mosley* and *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Respectfully submitted,

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